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FILED  
DISTRICT COURT OF GUAM

NOV 29 2006

MARY L.M. MORAN  
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

11 AMERICOPTERS, LLC, } CV 03-00005  
12 Plaintiff, }  
13 vs. }  
14 FEDERAL AVIATION }  
15 ADMINISTRATION, }  
16 Defendant. }  
17 MOTION TO DISMISS FOR  
18 FAILURE TO STATE A CLAIM OR, IN  
19 THE ALTERNATIVE, TO TRANSFER

20 The United States respectfully moves for the dismissal of the above entitled case because  
21 the plaintiff fails to state a claim upon which relief may be granted. In the alternative, defendant  
22 requests that this Court transfer this action to the Court of Federal Claims.

STATEMENT OF THE CASE

23 I. Nature Of The Case

24 Plaintiff, Americopters, LLC, filed a complaint in this Court alleging that the Federal  
25 Aviation Administration (“FAA”) had violated 14 C.F.R. § 13.20(b) and had committed a  
26 regulatory taking of its property in violation of the Fifth Amendment to the Constitution. After  
27 defendant filed a motion to dismiss, this Court dismissed the complaint by memorandum order  
28 dated December 29, 2003 because the Court lacked jurisdiction.

29 Americopters appealed to the Ninth Circuit. The court of appeals affirmed in part, but  
30 reversed the dismissal of the takings claim and remanded to this Court. Americopters, LLC v.  
FAA, 441 F.3d 726, 738 (9<sup>th</sup> Cir. 2006). The court of appeals ruled that Americopters’ takings

1 claim was not inescapably intertwined with an administrative challenge to an FAA order because  
2 there was no pending FAA order and no previous agency determination on the merits. Id.

3 II. Statement Of Facts

4 The following facts are taken from Americopters' complaint. We presume them to be  
5 true for purposes of this motion only.

6 Americopters ran a helicopter tour business from a rooftop helipad at a restaurant,  
7 Chuck's Steak House ("Chuck's"), in Guam. Complaint ("Co.") at ¶ 5. In February 2002,  
8 Clarence Kanae, Principal Operations Inspector for the FAA's regional flight standards office,  
9 inspected the helipad at Chuck's. Id. According to Americopters, during that visit, Mr. Kanae  
10 verbally identified a number of deficiencies of the helipad but never documented these concerns.  
11 Id. at ¶ 6. Americopters asked Mr. Kanae to "clarify and confirm with you all of the changes that  
12 you would like us to make to ... Chuck's" and provided him a list of improvements Americopters  
13 intended to make. Co. at ¶7, Exhibit ("Ex.") A.

14 On June 24, 2002, Americopters received a letter from Mr. Kanae that stated:

15  
16 This letter is to inform you that the use of the roof top as a helicopter-pad, at  
17 Chuck's Steak House, is considered unsafe, and does not meet the [FAA]  
18 Advisory Circular 150-5390-2A Heliport Design requirements. This AC is  
19 [a]dvisory in nature; however, this office feels that [14 C.F.R. § 91.13] will apply  
to this operation if the AC is not followed. Therefore, this office is requiring that  
your company immediately cease use of the Chuck's Steak House rooftop for all  
flight operations.

20 Co. at ¶ 10, Ex. B.

21 On August 13, 2002, counsel for Americopters wrote to the FAA alleging that Mr.  
22 Kanae's letter ordered it to cease operations without prior notice in violation of 14 C.F.R. §  
23 13.20(b). Co. at ¶ 13, Ex. D. Americopters requested rescission of the cease operations order,  
24 confirmation that planned improvements to the helipad at Chuck's would comply with FAA  
25 regulations, and 90 days to install improvements approved by the FAA. Id. In the alternative,  
26 Americopters requested a hearing pursuant to § 13.20(c). Id.

27 Americopters' complaint alleges that Mr. Kanae acted without authority, legal cause,  
28 other justification or prior notice, and that he acted outside the scope of his employment. Co. at ¶

1 10. As the court of appeals noted, the FAA agrees Mr. Kanae did not have the authority to issue  
2 orders upon behalf of the FAA. Americopters, 441 F.2d at 737.

3

4 ARGUMENT

5 I. Standard Of Review

6 A complaint may be dismissed for failure to state a claim pursuant to Federal Rule of  
7 Civil Procedure 12(b)(6) if it "appears beyond doubt that the non-movant can prove no set of  
8 facts to support its claims." Simpson v. AOL Time Warner Inc., 452 F.3d 1040, 1046 (9th  
9 Cir.2006). Alternatively, dismissal can be based upon the lack of a cognizable legal theory.  
10 SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F3d 780, 783 (9th Cir.1996). In  
11 evaluating such a motion "[a]ll allegations and reasonable inferences are taken as true, and the  
12 allegations are construed in the light most favorable to the non-moving party, but conclusory  
13 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss."  
14 Simpson, 452 F.3d at 1046.

15

16 II. The United States Is Not Liable For The Unauthorized Actions Of Its Employees

17 The Little Tucker Act, 28 U.S.C. § 1346(a)(2), confers jurisdiction upon a district court to  
18 consider takings claims against the Government that do not exceed \$10,000. When district court  
19 jurisdiction is based upon the Little Tucker Act, final decisions of the court are appealed to the  
20 United States Court of Appeals for the Federal Circuit. 28 U.S.C. § 1295(a)(2).

21 "A 'taking' occurs when the Government exercises its proper contract, property or  
22 regulatory power to control property or rights which it does not acquire through purchase."  
23 Torres v. United States, 15 Cl. Ct. 212, 215 (1988). The Government may not take private  
24 property for public use without providing just compensation. First English Evangelical Lutheran  
25 Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987).

26 Under some circumstances, regulatory action infringing upon private property without  
27 providing just compensation is invalidated on the basis that it "goes too far." Hodel v. Irving,  
28 481 U.S. 704, 718 (1987). However, the "Government hardly could go on if to some extent

1 values incident to property could not be diminished without paying for every such change in the  
2 general law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). "The general rule at  
3 least is, that while property may be regulated to a certain extent, if regulation goes too far it will  
4 be recognized as a taking." Id. at 415. The "Fifth Amendment's guarantee . . . [is] designed to  
5 bar Government from forcing some people alone to bear public burdens which, in all fairness and  
6 justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49  
7 (1960).

8 A threshold issue in a takings case is whether the taking is based upon authorized  
9 Government conduct. Regional Rail Reorganization Act Cases, 419 U.S. 102, 126-27 n.16  
10 (1974); Robert A. Hooe v. United States, 218 U.S. 322 (1910); Short v. United States, 50 F.3d  
11 994, 1000 (Fed. Cir. 1995). The plaintiff bears the burden of proving authority as an element of a  
12 cause of action for just compensation. Coast Indian Community v. United States, 550 F.2d 639,  
13 649 (Ct. Cl. 1977).<sup>1</sup> The act at issue must be "authorized, expressly or by necessary implication, .  
14 . . by some act of Congress," in order for the Government to be liable for a taking. Regional Rail  
15 Reorganization Act Cases, 419 U.S. at 127 n.16 (quoting Hooe, 218 U.S. at 336).

16 Here, both Americopters (Co. at ¶ 10) and the FAA agree that Mr. Kanae's actions were  
17 not authorized. Americopters, 441 F.2d at 737. Americopters admission that the actions were  
18 unauthorized (and the FAA's agreement) is fatal to Americopters case. Because the actions were  
19 unauthorized, Americopters complaint fails to state a claim upon which relief may be granted.  
20 E.g., Regional Rail Reorganization Act Cases, 419 U.S. at 127 n.16. Accordingly, the Court  
21 should dismiss the complaint.

22 III. In The Alternative, This Court Should Transfer This Action To The Court Of Federal  
23 Claims Unless It Agrees To Limit Its Damages To \$10,000

24 <sup>1</sup> The Court of Claims is the predecessor court to the Federal Circuit. In South Corp. v.  
25 United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982), the Federal Circuit adopted the precedent of  
26 the Court of Claims.  
27

1 The Federal transfer statute provides in relevant part:

2 Whenever a civil action is filed in a court ... and that court finds that there is a  
3 want of jurisdiction, the court shall, if it is in the interest of justice, transfer such  
4 action or appeal to any other such court in which the action or appeal could have  
been brought at the time it was filed or noticed ....

5 28 U.S.C. § 1631. The determination as to whether a district court or the Court of Federal  
6 Claims possesses jurisdiction to consider a takings claim depends upon the amount in  
7 controversy. As we stated above, this Court may consider a takings claim if the plaintiff seeks no  
8 more than \$10,000 in damages. 28 U.S.C. § 1346(a)(2). If the plaintiff seeks more than \$10,000,  
9 the Court of Federal Claims possesses exclusive jurisdiction to consider the action. Eastern  
10 Enterprises v. Apfel, 524 U.S. 498, 520 (1998).

11 Americopters does not state the amount it seeks in its complaint. Nor has it yet  
12 responded to our requests that it specify the amount that it seeks. It has given no indication that  
13 it is willing to limit its damages to \$10,000. Accordingly, unless Americopters agrees to limit its  
14 damages to \$10,000, defendant respectfully requests that the Court transfer this action to the  
15 Court of Federal Claims.

16 Respectfully submitted this 29<sup>th</sup> day of November, 2006.

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21 By:

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